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BETWEEN TV3 NETWORK LIMITED
(In Receivership) a duly
incorporated company having its
registered office at Auckland, and
carrying on business as a television
broadcaster

First Appellant

19030429. v3

0429TV3H

AND TV3 NETWORK SERVICES
LIMITED a duly incorporated
company having its registered office
at Auckland, and carrying on
business as a television broadcaster

Second Appellant

AND EVEREADY NEW ZEALAND
LIMITED a duly incorporated
company having its registered office
at Auckland, and carrying on
business *inter alia* as a distributor of
home safety products

First Respondent

AND HOME AND SAFETY NZ
LIMITED a duly incorporated
company having its registered office
at Auckland, and carrying on
business as a distributor of home
safety products

Second Respondent

Coram: Cooke P.
Gault J.
McKay J.

Hearing: 17 February 1993

Counsel: J.G. Miles Q.C. and M.G. Ring for Appellants
W.A. Smith and Jane E. Small for Respondents

Judgment: 29 April 1993

JUDGMENT OF COOKE P.

This appeal raises the question whether, in an action against a television broadcasting organisation for malicious falsehood or defamation, a claim for a mandatory injunction to broadcast corrective advertising should be struck out before trial on the ground that it is so clearly untenable that the plaintiff cannot possibly succeed. Reversing a decision of a Master, Robertson J. held against striking out in a judgment delivered on 14 July 1992 and reported in 5 P.R.N.Z. 369. Subsequently he gave the first and second defendants (TV3) leave to appeal.

The action, in which the plaintiffs plead malicious falsehood as the first cause of action and defamation as a further and additional cause of action, was commenced on 16 October 1990. It arises out of a 16-minute documentary about ionisation smoke detectors, broadcast by TV3 on 7 October 1990 as part of the current affairs programme *60 Minutes*. The plaintiffs say that they are importers and distributors in New Zealand of a range of such detectors which were identified in the documentary and that it contained false, malicious and defamatory statements about their product, to the damage of their reputation and sales. Large sums are claimed for general, special and exemplary damages. In addition an amended statement of claim dated 22 January 1992 prays the following relief:

A mandatory injunction against the First and/or Second Defendants directing the First and/or Second Defendants to broadcast corrective advertising in a similar manner and form to that in which the false statements and false visual effects were broadcast and with the same prominence that the false statements and false visual effects were given.

As well as denials of the allegations made by the plaintiffs, the first and second defendants plead truth, fair comment on a matter of public interest, and qualified privilege. The third, fourth and fifth defendants, who were contributors to the documentary, have taken no part in the hearings before the Master, the Judge or this Court. In the judgment under appeal Robertson J. concentrated on the cause of action pleaded in defamation, but his reasoning applies equally to the malicious falsehood cause of action.

One of the submissions in the written synopsis for the appellants was that the primary reason for inserting the further prayer into the amended statement of claim was to pre-empt the right of the defendant to seek a trial by jury. At our hearing, however, counsel for the appellants abandoned any argument of abuse of process, and I think rightly so. If the only claim is for pecuniary damages, either party has the *prima facie* right to a jury under s.19A of the Judicature Act 1908. But that section and s.19B confer jurisdiction on the Court to order trial without or with a jury on certain grounds. That control remains. The case is obviously one in which difficult questions in relation to scientific matters are likely to arise; if the defendants were able to set the case down for jury trial, it would be open to the plaintiffs to apply for a Judge alone trial on the ground that such an investigation cannot conveniently be made with a jury. In any event I respectfully agree with and regard as in point the decision of the English Court of Appeal in *Joyce v. Sengupta* [1993] 1 All E.R. 897. In that case a plaintiff who could have sued in defamation sued in malicious falsehood instead, thereby undertaking the burden of proving both falsehood and malice. The defendant maintained that this was an abuse of process, on the ground that the plaintiff was actuated by the consideration that legal aid was available for malicious falsehood but not for defamation proceedings. Sir Donald Nicholls V-C said at 902:

When more than one cause of action is available to him, a plaintiff may choose which he will pursue. Usually he pursues all available causes of action, but he is not obliged to do so. He may pursue one to the exclusion of another, even though a defence available in one cause of action is not available in another. Indeed the availability of a defence in one cause of action but not another may be the very reason why a plaintiff eschews the one and prefers the other. Limitation is an example of such a defence. I have never heard it suggested before that a plaintiff is not entitled to proceed in this way, and take full advantage of the various remedies English law provides for the wrong of which he complains. I have never heard it suggested that he must pursue the most appropriate remedy, and if he does not do so he is at risk of having his proceedings struck out as a misuse of the court's procedures. In my view those suggestions are as unfounded as they are novel.

By parity of reasoning the plaintiffs cannot be compelled to confine their action to monetary claims if some other form of relief, such an injunction, is properly claimable.

Jurisdiction

Robertson J. in the High Court and my brothers Gault and McKay in this Court are all of the opinion that the courts have jurisdiction to grant an injunction requiring corrective advertising. I agree, gratefully adopt their reasons, and will not repeat all the citations of judicial authorities (there are surprisingly few directed to the precise question), law reform reports, and textbooks and articles to be found in their judgments. Only on a few salient points do I wish to say something.

Especially since the mingling of law and equity, which is accepted in New Zealand, the remedy of injunction should be available whenever required by justice. To impose jurisdictional limits, as distinct from identifying factors which

on practical grounds will tell against the discretionary grant of the remedy, would be a backward step. It would be inconsistent with the past approach of this Court. See for example *Thomas Borthwick & Sons (Australasia) Ltd v. South Otago Freezing Co. Ltd* [1978] 1 N.Z.L.R. 538, where an injunction was upheld although having the effect of requiring the performance of a long-term commercial contract entailing co-operation between the parties.

This Court is thoroughly alive to the importance of the freedom of the media, as has been demonstrated in numerous decisions among which mention may be made of the Spycatcher case, *Attorney-General v. Wellington Newspapers Ltd* [1988] 1 N.Z.L.R. 129, 176, and *Auckland Area Health Board v. Television New Zealand Ltd* [1992] 3 N.Z.L.R. 406. And see further, for an instance of the appropriateness of broadcasting to a wide public, the Maxicrop case, *Bell-Booth Group Ltd v. Attorney-General* [1989] 3 N.Z.L.R. 148, 157. In the *Auckland* case, while not doubting that there was jurisdiction to restrain the publication of defamatory matter and to order the production of a proposed script, the Court declined to take the latter wholly exceptional course as the evidence was not strong enough to warrant it. But we had occasion to point out that some of the argument for the respondent in that case seemed to savour of an attempt to put the media above the law (in the sense of claiming a right to broadcast whatever the respondent chose, subject only to the risk of a subsequent award of damages). Just as that was unacceptable, so I think it unacceptable to assert a right never in any circumstances to be compelled by the Courts to publish a correction.

The facts that no instance of such an injunction has been found, and that text writers, law reform bodies and even some Judges may have assumed that the jurisdiction does not extend so far, are certainly a warning that a Court should be slow to grant the remedy; but they cannot establish the absence of jurisdiction.

There are well-known instances of the discovery that justice requires an established equitable remedy to be adapted to a new use. For example piracy of films and recordings in breach of intellectual property rights led to the judicial creation of Anton Piller orders: see *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch. 55; *Busby v. Thorn EMI Video Programmes Ltd* [1984] 1 N.Z.L.R. 461, 465-7; Sim and Cain, *Practice and Procedure*, 12th ed. revised, pp.2037-2047. So too the Mareva injunction (*The Mareva* [1980] 1 All E.R. 213n) was devised to prevent debtors disposing of assets before trial. The limits of that jurisdiction or discretion are still being worked out (see *Zucker v. Tyndall Holdings plc* [1993] 1 All E.R. 124; Sim and Cain, *op.cit.* pp.2024-2036). Section 16 of the Judicature Act 1908 and Rule 624(2) of the High Court Rules are wide enough to embrace jurisdiction to order corrections. No convincing reason appears for cutting that use of the remedy of injunction out of the scope of those provisions.

The social desirability of correction as a remedy for defamation or injurious falsehood seems clear enough. In a lecture at the University of Victoria, British Columbia (5 U.B.C. Law Review 15), Professor J.G. Fleming commended the widest deployment of reply and retraction (possibly including compulsory correction) as remedies for libel which would assist rather than impede the dissemination of correct information without imposing more than a negligible burden on the media. Specific powers to order corrective statements are conferred on the High Court on the application of the Commerce Commission by s.42 of the Fair Trading Act 1986, and on the Broadcasting Standards Authority by s.13 of the Broadcasting Act 1989. The existence of statutory powers in certain fields is not inconsistent with curial jurisdiction to make similar remedies available in the fields of malicious falsehood or defamation. Rather it is a case where the common law can develop in harmony with legislation: compare *Dominion Rent A Car Ltd v. Budget Rent A Car Systems (1970) Ltd* [1987] 2 N.Z.L.R. 395, 407.

It should be mentioned that, on the application of the present appellants, McGechan J. made on 31 October 1991 an order staying determination of a complaint by the respondents to the Broadcasting Standards Authority. The order is in force until the present High Court proceedings are concluded or directed to be tried by Judge alone. It cannot at this stage affect the issues raised by the present appeal.

In the argument for the present appellants much weight was placed on the point that in the Defamation Act 1992, ss.26 and 27, Parliament has not gone further than conferring on the Court powers to recommend corrections. We were referred to the speech of the Minister of Justice, the Hon. D.A.M. Graham, on the third reading of the Bill, 531 N.Z.P.D. 12331, which shows that the original proposal to enact mandatory powers was abandoned. But, although the Minister mentioned that the media opposed such a provision as an infringement of press freedom, the reason actually given by him for the change was that the Court could not order a correction until it had given final judgment in favour of the plaintiff: that could be two or three years after the proceedings had been filed: a correction order then would be a waste of time or make the matter worse for the plaintiff.

Thus the House of Representatives was not asked to approach the question on the basis that correction orders are inherently objectionable. What view the House would have taken had it been drawn to attention that the Court might already have a compulsory jurisdiction can only be a matter for speculation. In any event the Act (except s.5, relaxing the necessity of proving special damage) does not apply to proceedings for malicious falsehood, nor to proceedings for defamation commenced before it came into force on 1 February 1993. No opinion is now called for on the effect of the Act on defamation proceedings commenced thereafter.

A Bill of Rights Point

Section 14 of the New Zealand Bill of Rights Act 1990 provides:

14. Freedom of expression - Everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form.

The section is similar to article 19 of the Universal Declaration of Human Rights, article 19(2) of the International Covenant on Civil and Political Rights, and article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. All those instruments include the right to *impart* information. Section 2(b) of the Canadian Charter of Rights and Freedoms and the First Amendment of the United States Constitution include no express mention of *imparting*.

Mr Miles suggested that s.14 might strengthen the case for the appellants. For two reasons it seems to me to have the opposite tendency. In the first place, by s.5, subject to the primacy of other enactments (see ss.4 and 6), the rights and freedoms contained in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. We are concerned here with the common law. As is still the case with parts of the general law of defamation since the Defamation Act 1992, the common law can effectively prescribe a limit to s.14 falling within s.5. In *Slaight Communications Inc. v. Davidson* (1989) 59 D.L.R. (4th) 416, a majority of the Supreme Court of Canada held that an order of an industrial adjudicator requiring a former employer to give a former employee a letter of recommendation specifying certain facts was justified under s.1 of the Charter, corresponding to the New Zealand s.5. Jurisdiction to order corrective advertising can be similarly justified in New Zealand.

It is instructive too that, while the United States Supreme Court has held right of reply statutes unconstitutional as to the press, it has been expressly noted that a right of retraction statute is not necessarily forbidden: *Miami Herald Publishing Co. v. Tornillo* 418 U.S. 241, 258 (1974). And, more importantly, the limited number of available frequencies has been held to give rise to a fiduciary obligation on a broadcaster to afford a right of reply to attacks. *Red Lion Broadcasting Co. v. Federal Communications Commission* 395 U.S. 367 (1969) is the leading case. The obligation is enforceable by the Commission.

In the second place, the freedoms affirmed in s.14 are to be enjoyed by everyone, not merely the media, and by s.29 they apply for the benefit of all legal persons as well as all natural persons. I think that the freedom to impart information may well be supported by a jurisdiction to compel the publication of corrective statements when the person has established actionable defamation. Under the European Convention it has been said that whether freedom of expression implies the right of replication or rectification still has not been clarified: van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (1990) 412. The European Commission, while considering that there was no breach of the Convention in a refusal by the BBC of broadcasting time during a general election campaign to an association putting forward no candidates, said that the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue under article 10 alone or in conjunction with article 14 (anti-discrimination): *Application 4151/70, X and the Association of Z v. United Kingdom* (1971) 38 Collection M.R. 86,88, noted in 18 *Halsbury's Laws of England*, 4th ed. para. 1694, n.2.

By s.3(b) the Bill of Rights applies to acts done by any person or body in the performance of any public function, power, or duty conferred or imposed on the

person or body by or pursuant to law. In this case it is admitted that the first defendant is a duly licensed television broadcaster under the Broadcasting Act 1989. Certain responsibilities, including some relating to balance in controversial issues of public importance, fall on it under s.4 of that Act. The first and second defendants plead *inter alia* that the statements in the programme were made *bona fide* and without malice in the discharge of a duty to communicate the information to the New Zealand public, which had a corresponding legitimate interest in receiving the statements and the words and images complained of. On that ground they seek qualified privilege. In the circumstances I think it a tenable view that, if the plaintiffs establish malicious falsehood or unlawful defamation, the Bill of Rights may provide a basis for an order that corrective information be broadcast to the viewing public.

The foregoing reasons also harmonise with the right of reply as a means of resolving libel disputes which exists in at least 13 European countries, generally but apparently not invariably in statutory form: see Danziger *The Right of Reply in the United States and Europe* (1986) 19 New York University Journal of International Law and Politics 172, 183. In a matter such as the basic duties of broadcasters, it would seem that democracies can move through their legislative and judicial decision-making towards common standards.

An Arguable Case

The one question dividing this Court is whether, granted jurisdiction, the plaintiffs have on the pleadings an arguable case for its exercise. While accepting that the jurisdiction is likely to be exercised in exceptional cases only, and that the time which elapses before a final determination of the case may be a significant

factor, I do not consider that an exercise of the jurisdiction can by any means be dismissed as unthinkable at this stage. There is a possibility that the plaintiffs will prove that false statements and visual effects referring to them were broadcast knowingly or recklessly for the purpose, as they claim, of increasing viewing ratings on TV3 generally and for the *60 Minutes* programme in particular. Of course this Court is in no position now to make any findings on those allegations. But if such allegations were made out, it cannot confidently be assumed that the plaintiffs would be left simply to their remedy in damages.

The grant or refusal of an injunction is an issue for the trial Judge and must depend very largely on the findings of fact made at the trial. On a trial by Judge alone the Judge would be able to decide whether to hear and determine all questions relating to relief at the same time, or to defer a hearing on corrective statements until he has determined liability and fixed damages. If the plaintiff is claiming a corrective statement, some allowance for the contingency of this may be made when damages are assessed. On a jury trial the correction issue would necessarily have to be deferred. Since the jury are entitled to take into account the possibility that the 'libel, driven underground, emerges from its lurking place at some future date' (*Cassell & Co. Ltd v. Broome* [1972] A.C. 1027, 1070, per Lord Hailsham of St. Marylebone L.C.), it would be right to inform them also of any possibility of a correction order. But because most of the damage will have been done already, and because of 'the sad truth that no apology, retraction or withdrawal can ever be guaranteed completely to undo the harm it has done or the hurt it has caused' (*Associated Newspapers Ltd v. Dingle* [1974] A.C. 371, 399, per Lord Radcliffe), they should probably be discouraged from making any major reduction on account of this contingency. Again much must turn on the facts as they emerge at the trial.

For these reasons I would dismiss the appeal. In accordance with the opinion of the majority, it will be dismissed with costs to the respondents in the sum of \$3500 and disbursements, including the reasonable travelling and accommodation expenses of two counsel, to be settled by the Registrar.

R. B. Milne P.

Solicitors:

McElroy Milne, Auckland, for Appellants

Chapman Tripp Sheffield Young, Auckland, for Respondents

BETWEEN TV3 NETWORK LIMITED
In Receivership)

First Appellant

AND TV3 NETWORK SERVICES
LIMITED

Second Appellant

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LIMITED

First Respondent

AND HOME AND SAFETY NZ LIMITED

Second Respondent

Coram: Cooke P
Gault J
McKay J

Hearing: 17 February 1993

Counsel: J G Miles QC and M G Ring for Appellant
W A Smith and Jane E Small for Respondent

Judgment: 29 April 1993

JUDGMENT OF GAULT J

This is an interlocutory appeal pursuant to leave against the judgment of Robertson J delivered in the High Court at Auckland on 14 July 1992 reversing on review the order of Master Gambrell striking from the statement of claim part of the prayer for relief.

The amended statement of claim runs to 42 pages with a further six pages of schedules setting out the special damages claimed. The plaintiffs, the respondents in this Court, who are importers and distributors of ionisation smoke detectors allege malicious falsehood and defamation in a television programme relating to those products which was broadcast by the appellants or one of them.

The broadcast was a 16 minute segment of the programme 60 Minutes shown on 7 October 1990. It dealt with safety of the ionisation smoke detectors containing minute quantities of the substance Americium 241 essential to their operation because of its radio activity. Matters covered were the danger of the substance, labelling of the detectors containing it and potential disposal problems. The products were associated with the respondents as suppliers. The first cause of action in injurious falsehood alleges 14 false statements with particularised meanings disparaging of the product said to have been made maliciously and with improper motives evidenced in part by selectivity in interview segments said to give rise to distortion of views actually expressed. There are further allegations of disparagement by visual effects associating the product with nuclear weapons and dangerous radiation levels.

The second cause of action in defamation repeats all of the allegations made in the claims of injurious falsehood and pleads defamatory presentation of the respondents as knowing distributors of dangerous products with inadequate warning labels giving rise to injury to trade reputation.

The statement of defence admits the programme, denies some of the meanings alleged and pleads justification for most of the statements as well as fair comment and qualified privilege.

The respondents also applied to the Broadcasting Standards Authority shortly after this proceeding was commenced. After the Authority resolved to proceed with parts of the complaint perceived as not in conflict with the litigation the broadcasters applied for judicial review. In a lengthy judgment in the High Court McGechan J reviewed the nature of the complaints before the Authority and the allegations in the Court proceeding and, for the reasons given, he set aside the Authority's decision to proceed and ordered a stay of the complaint proceeding until such time as the High Court litigation shall have been determined, settled or discontinued permanently or the Court shall have directed trial before a Judge alone whichever may be the soonest. He reserved leave to apply in the event of lack of co-operation in seeking the prompt disposition of the Court proceeding. The judgment makes it clear that no sufficient grounds for a continued stay would exist if this proceeding is to be tried before a Judge alone.

It was only after that decision that the statement of claim in this proceeding was amended to introduce the claim for an order for corrective advertising. The remedies sought in respect of each cause of action were amended to include:

A mandatory injunction against the First and/or Second Defendants directing the First and/or Second Defendants to broadcast corrective advertising in a similar manner and form to that in which the false statements and false visual effects were broadcast and with the same prominence that the false statements and false visual effects were given.

The appellants applied to strike out this claim. The Master did not consider the Court could impose such a remedy which more appropriately is available on application to the Broadcasting Standards Authority under s 13 of the Broadcasting Act 1989. It was the Master's view that if the respondents succeed in the Court proceeding they then can go back to the Authority to secure any order for corrective broadcasting considered appropriate.

The respondents' motivation for the inclusion of the claim for corrective broadcasting has been questioned. They say they are indifferent whether it is ordered by the Court or the Authority but they want public correction at the earliest possible date. For that reason they incorporated the claim in the Court proceeding after the Authority's complaint proceeding was stayed. On the other hand, for the appellants it is contended that the inclusion of the claim in the Court action is designed to preclude the right of the appellants under s 19A of the Judicature Act 1908 in the case of a claim for damages only to have the matter tried before a Judge and a jury subject only to a contrary order on the grounds specified in subs (5). Even if that were so, if a procedural step is legitimate it is not rendered otherwise merely because it is taken for tactical reasons. It will be a matter to be determined in due course whether the proceeding is appropriate for trial with a jury and nothing now should be said that might prejudice that.

Robertson J in setting aside the Master's order striking out the claim for corrective advertising concluded that a mandatory injunction ordering corrective advertising is not relief which is so clearly untenable that the plaintiff cannot possibly succeed. He said that both authority and principle point to this development as being a possible recognition of a valuable weapon in the armoury of equity. He did not draw any distinction between the causes of action in malicious falsehood and defamation. His judgment in effect rejects both arguments for the broadcasters that there is no jurisdiction to make such orders and, in the alternative, that even if there is jurisdiction there can be no prospect of such orders being made in this case as it is pleaded.

In this Court the primary argument advanced by Mr Miles for the broadcasters is that in defamation proceedings the Courts have never claimed jurisdiction to order publication of corrective statements and that it is now too late

to do so. He contended that the absence of such orders is consistent in principle with the right to freedom of speech. He submitted that an order to publish is as much a contravention of that right as an order not to publish.

From the materials to which we were referred by counsel it appears that the question of jurisdiction is without clear authority and such views as have been expressed are unsupported by any extensive reasoning or reference to principle.

In *Burnett v The Queen in Right of Canada* (1979) 94 DLR (3d) 281 O'Driscoll J, in the Ontario High Court in a defamation action brought against the Canadian Broadcasting Corporation in respect of a television documentary, struck out a claim for an order for a full and fair retraction. That part of his judgment reads simply:

As I read s 5(2) of the *Libel and Slander Act*, an aggrieved plaintiff is awarded damages. Section 5(2)(d) speaks of a retraction but only as something a defendant has voluntarily done in order to mitigate damages. Counsel for the plaintiff was not able to refer to any decision where a Court made an order in any way resembling the relief sought in para. 52(g). An order will go striking out the said subpara. (g) of para. 52.

That decision is the authority cited in leading texts in support of the general proposition that in the absence of any threat of repetition the only relief in defamation proceedings is damages, and no claim for a retraction can be made: *Gatley on Libel and Slander* (8th ed) para 1086, *Fleming, The Law of Torts* (8th ed) 593. There are no references to orders for retraction being available in *Duncan and Neill on Defamation* (2nd ed) 123, *Carter Ruck on Libel and Slander* (4th ed) 177 et seq. *Spencer Bower on the Law of Actionable Defamation* (1990 reprint) 151. None of these works presents reasons why in principle the equitable remedy of mandatory injunction should not be available in an appropriate case.

In *Halsbury* (4th ed) Vol 28 para 258, n5 it is said with reference to final injunctions that if necessary a mandatory injunction will be granted. The authority cited is *Hermann Loog v Bean* (1864) 26 Ch D 306. That was a case directed primarily to slander by damaging and false statements made to trade customers of a former employer. A mandatory injunction was ordered by Pearson J and upheld by the Court of Appeal requiring the employee to withdraw a letter of instruction to the Postmaster directing that mail addressed to him but belonging to the former employer should be redirected to his home address. There is some suggestion in the report that the instruction originally given to the Postmaster may have been defamatory in that it indicated contrary to the fact that the former employer was not entitled to the mail. It can be said that the mandatory injunction was directed to a defamatory and malicious falsehood and was corrective in nature. It may be however that the mandatory injunction was granted as relief in a different cause of action.

Mr Smith helpfully referred us to a judgment of the United States Court of Appeals Third Circuit in *Kramer v Thompson* (1991) 947 FR (2d) 666. The Court held that an injunction to restrain further defamatory statements could not stand because it was contrary to the constitution of the State of Pennsylvania. It was held further that an order made by the trial Judge directing the writing of letters of retraction by the defendant could not stand. The case is of immediate interest on this aspect. The judgment states that the Court had reviewed the available literature and reported decisions and that although the notion of compelled retraction occasionally has been advanced in the literature they found no case in which such a remedy had been awarded. Reference was made to the decision of the Supreme Court in *Miami Herald Publishing Co v Tornillo* 418 U S 256 which held a Florida statute providing for a right of reply to be unconstitutional as contrary to the First Amendment right of free speech but in which there is a brief statement in a

concurring judgment of Justice Brennan reserving his view on the constitutionality of a "retraction" statute. The case of *Kramer v Thompson* did not involve any statutory power and the Court of Appeals concluded that there was no support for the various retractions and withdrawals ordered against the defendant and the orders therefore were reversed. Clearly the underlying reason for the view taken by the Court was the inconsistency of any mandatory retraction with the constitutionally guaranteed freedom of speech.

In England and in this country, at the interlocutory injunction stage in defamation proceedings, publication will be restrained only in exceptional circumstances when the defendant intends to justify: *Ron West Motors Ltd v BCNZ* (No 2) [1989] 3 NZLR 520, *Auckland Free Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406, 407. Different considerations apply after the claims are determined. An injunction then may be granted to restrain repetition of defamatory statements although generally that will be regarded as unnecessary unless there is some threat of repeated publication: *Gatley* para 1472. This is just a particular application of the general rule that an injunction will not be granted unless it is shown to be necessary: *Proctor v Bayley* (1889) 42 Ch D 390, 401.

We were referred to reports on the reform of the Law of Defamation - the McKay committee report of 1977 in New Zealand, The Faulk committee report in the United Kingdom in 1975, and the discussion paper of 1976 and the report (No 11) in 1979 of the Australian Law Reform Commission. The reviews of the present law in those reports give no indication of a jurisdiction to order corrective publication. On the contrary the reports refer to the power to order publication of corrections or apologies as a subject for possible reforms. In fact this was the subject of a recommendation in Australia.

Mr Miles also submitted that recent New Zealand legislative action has reflected a clear recognition that no jurisdiction exists to order publication of corrections. Further, he referred to the amendments in the course of the legislative process to clause 19 of the Defamation Bill which provided for mandatory corrective orders but which was not carried into the Defamation Act 1992 when it was enacted. This, he contended, constituted clear legislative rejection of mandatory corrective orders which should preclude the Court from now assuming jurisdiction to make such orders. Of course we are presently concerned with the law applicable before the passing of the Act. In that respect Mr Miles submitted that it would be a surprising result if the Courts now held that they had always had this right despite the firm views of all the recognised authorities on the subject and the assumptions that Parliament had been making when debating the Bill.

The thrust of the case for the appellants is that good reason exists for treating defamation cases as in a special category to which the remedy of injunction should not extend. The reason is in the higher value of the freedom of speech. There was emphasis upon the special place occupied by the media. That of course is recognised. Reference already has been made to the approach taken by the Courts to applications to restrain publication of alleged defamatory statements at the interlocutory stage. On the other hand reference also already has been made to the established jurisdiction to restrain further publication of defamatory statements after judgment where that is shown to be necessary.

That there is no public policy imperative dictating non-intervention by orders to correct or retract is indicated by the enactment of powers conferred by the Broadcasting Act on the Broadcasting Standards Authority and on the Courts under the Fair Trading Act 1986 (s 42). Further, I do not consider the New Zealand Bill of Rights Act 1990 dictates a refusal of jurisdiction in all cases no matter how

seriously the right of free speech may have been abused. Reasonable limitations are provided for.

It has also to be borne in mind that not all defamation proceedings involve the mass media. This can be said even more strongly of proceedings for malicious falsehood in relation to which McGechan J expressed the view that in an appropriate case a mandatory injunction might be ordered in *Squibb & Sons (NZ) Ltd v ICI New Zealand Ltd* (1988)2 NZBLC 103382, 103404. I expressed a similar view in an interim judgment at first instance in a comparative advertising context in *Alan H Reid Engineering Ltd v Ramset Fasteners (NZ) Ltd* (1990) 3 PRNZ 676, 681.

In none of the texts and law reform reports to which we have been referred is there any reasoned analysis of the applicability of the general equitable powers of the Courts in proceeding for defamation and injurious falsehood. There is the underlying assumption that the Courts will not invoke these powers in the field of defamation because they have not done so in the past but there is no reasoned case for the Courts lacking the jurisdiction to do so where in particular cases that might be appropriate.

Professor Fleming in an article apparently prompted by the discussion paper of the Australian Law Reform Commission (Retraction and Reply: Alternative Remedies for Defamation (1978) 12 UBCL Review 15) concluded strongly:

To sum up, I commend the widest deployment of Reply and Retraction to help break the traditional deadlock faced by the law of defamation between the individual's interest in his reputation and the general concern in the free flow of accurate information. That deadlock is largely a product of the damages remedy for injury to reputation. Its all-or-nothing aspect necessarily entails subordinating completely the one interest to the other, to the ultimate detriment of both; rather reminiscent of such other puritanical common law blunders as the all-or-nothing rule of contributory negligence and the rule against contribution among tortfeasors. In contrast, Reply and

Retraction as remedies for libel assist rather than impede the dissemination of correct information without imposing more than a negligible burden on the media. As the Draft Convention of Freedom of Information, passed at the 1948 United Nations Conference in Geneva, article 4 resolved: "The Contracting States recognize that the right of reply is a corollary of freedom of information." That burden the media should cheerfully bear in token of the social responsibility which accompanies their pivotal role in modern society.

He had said in the immediately preceding paragraph however that Court directed retraction is alien to our common law culture and clearly expressed his views on the basis that any change would need to come in the form of legislation. He did not advert to the possibility of the Courts drawing upon the remedy of mandatory injunction already employed in other fields when shown to be appropriate in the interests of justice.

That is the approach taken by Robertson J in this case. He began with the passage from *Spry Equitable Remedies* (4th ed) 318 reading:

The powers of courts with equitable jurisdiction to grant injunction are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when this course accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by Judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate.

As the Judge went on to state that passage is supported by high authority. He referred expressly to *South Carolina v Assurantie Maatschappij 'de Zeven Provinciën' NV* [1986] 3 All ER 487; *British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39 and *Castanho v Brown & Root (UK) Ltd* [1981] 1 All ER 143.

In the judgment of four members of this Court in *Aquaculture Corporation v NZ Green Mussel Co Ltd* [1990] 3 NZLR 299, 301, in the context of remedies for breach of the equitable duty of confidence, reference was made to the mingling or merger of law and equity and it was said that for its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute. In my view it can equally be said that in the case of historically common law claims it is consistent with the process of fusion of law and equity that in order best to serve the interests of justice the Courts should have available the full range of remedies for appropriate cases.

The action for defamation developed in the common law as attracting remedy only in damages. That did not prevent the use of injunctions to restrain threatened repeated publication of defamatory statements after the passing of the Judicature Acts. In principle therefore there is no jurisdictional bar to an injunction cast in mandatory form. Indeed that is what occurred in *Hermann Loog v Bean* (supra). Referring to that case in connection with jurisdiction to grant injunctions the Court of Appeal in *Monson v Tussauds Ltd* [1894] 1 Q B 671, 690 - 698 took the view that there was no justifiable distinction between defamation and trade libel.

I consider it would be to move against the current of these developments to hold as a matter of jurisdiction that the power to grant injunctive relief is limited in these particular classes of case to exclude in all circumstances the formulation of an injunction in mandatory terms. I adopt the view of Lord Goff of Chieveley in the *South Carolina* case (p 499) when he said:

I am reluctant to accept the proposition that the power of the Court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available.

There is the qualification to be made that in respect of actions for defamation (but not injurious falsehood) to which the 1992 Act applies it may be necessary in the future to examine the impact of the legislative rejection of power for the Courts to make corrective orders.

It must be for the circumstances of particular cases to dictate whether a remedy is suitable. In defamation cases the freedom of speech and the appropriateness of a Court's direction to the press or electronic media to publish or broadcast will be of great importance. So too will be the practicability of ordering retraction or correction in cases where the assessments of damages (which would be affected by such orders) are in the hands of a jury. Another factor will be the lapse of time between the publication of the defamatory statement and the time for compliance with any order for retraction or correction. In many cases the gap will be such as to raise a question of whether further publication would be counter-productive. On the other hand the modern approach to the dissemination of information in fields of consumer safety, the impact on trading interests, whether malice has been proved, whether the injury is shown to be continuing and the fact that the issue of remedy arises only after it has been shown that there has been an abuse of the right of freedom of speech also may be relevant factors. Those are all matters that go to the discretion whether or not to make any order. They do not go to the Court's jurisdiction.

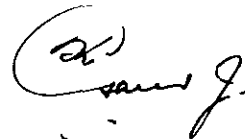
Accordingly, I consider Robertson J was correct in the conclusion he reached as to jurisdiction.

I turn to Mr Miles' alternative argument that on the pleadings in this case there is no tenable case for an order for corrective publication. Counsel were agreed that at the striking out stage it must be shown that the relief is so clearly untenable that the plaintiff cannot possibly succeed: *Takaro Properties v Rowling*

[1978] 2 NZLR 314, 316-7, *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd, Mortensen v Laing* [1992] 2 NZLR 282, 305 and 311.

The complexity of the case apparent from the extent of the pleadings with causes of action both in malicious falsehood and defamation, and the fact that there has yet to be decided whether there will be a jury trial mean that it would be no more than speculation to attempt to predict the state of things at the time decisions are to be made as to relief. In that situation I am left unable to accept that the test has been satisfied. The present allegations include deliberate and malicious misinformation purveying without disclosure the views of a particular lobby group and deliberate distortion of expert views to damage the respondents in their trade. If established, these matters would leave the appellants little high ground from which to invoke the privilege of media freedom to resist attempts to prevent continuing damage if that is shown to be occurring. In saying that I do not wish to be taken as putting the likelihood of an order of the kind sought above merely arguable.

On this ground also I would dismiss the appeal.



Solicitors

McElroy Milne, Auckland, for Appellants

Chapman Tripp Sheffield Young, Auckland, for Respondents

BETWEEN TV3 NETWORK LIMITED (In
Receivership)

First Appellant

A N D TV3 NETWORK SERVICES LIMITED

Second Appellant

A N D EVEREADY NEW ZEALAND LIMITED

First Respondent

A N D HOME AND SAFETY NZ LIMITED

Second Respondent

Coram: Cooke P
Gault J
McKay J

Hearing: 17 February 1993

Counsel: J G Miles QC and M G Ring for Appellants
W A Smith and Jane E Small for Respondents

Judgment: 29 April 1993

JUDGMENT OF MCKAY J

The respondents are the plaintiffs in these proceedings. They are the distributors in New Zealand of certain ionisation smoke detectors which contain the radioactive material americium 241. They complain of various statements made on a television programme broadcast by one or other of the appellants, who are named as first and second defendants. The programme included interviews on camera with the remaining defendants, who took no part in the present appeal. Two causes of

action have been pleaded, one based on the tort of malicious falsehood, and the other being in defamation. On the first cause of action, the plaintiffs between them claim a total of \$3,928,880, this figure including exemplary damages. They allege disparagement of their goods, lost sales, damage to market reputation, and lost sales of related products. On the cause of action in defamation, they claim disparagement to their reputations, damage to market reputation, lost sales, wasted expenditure and advertising costs in mitigating the effects. The same amounts are claimed and the particulars of special damages are the same. Although pleaded as an additional cause of action, we were told that the same damages were claimed under each, and not cumulatively.

The respondents by their statement of defence admit the broadcast, but deny that the words complained of were understood to refer to the plaintiffs, and that they bear or could be understood to bear the meanings of which the plaintiffs complain. They deny malice. They plead that the words were true in substance and in fact, that they were fair comment on a matter of public interest, and that they were published on an occasion of qualified privilege. These last three defences are special defences relevant to defamation. They have no relevance to malicious falsehood, where the plaintiffs must prove as part of their cause of action that the words were false and that they were published maliciously.

The appeal raises a very narrow point, but one of some importance. It relates to the power of the court to grant relief by way of a mandatory order for publication of corrective material.

The broadcast took place on 7 October 1990, and the proceedings were issued on 9 October. On 1 November the plaintiffs lodged a complaint against the first appellant, TV3 Network Ltd, pursuant to the Broadcasting Act. This was followed on 15 February 1991 by a complaint to the Broadcasting Standards

Authority, and a decision by that Authority on 4 July to proceed with the complaint. TV3 then applied to the High Court to review the decision of the Authority, and on 31 October McGechan J set aside its decision and ordered a stay of proceedings pending decision on the mode of trial of the High Court proceedings.

This was followed on 22 January 1992 by the filing of an amended statement of claim, which not only quantified the claims for special damages and added the claims for exemplary damages, but included also in respect of each cause of action a prayer for a mandatory injunction in the following form:

"A mandatory injunction against the First and/or Second Defendants directing the First and/or Second Defendants to broadcast corrective advertising in a similar manner and form to that in which the false statements and false visual effects were broadcast and with the same prominence that the false statements and false visual effects were given."

The respondents explain this on the basis that they believe that a broadcast correction is an appropriate form of relief to counter the effects of the alleged false statements and false visual effects published on the programme. They had hoped that the Broadcasting Authority would exercise its power under section 13(1)(a) of the Broadcasting Act 1989 to order TV3 to publish an appropriate statement, but this had been pre-empted by the order made by McGechan J. They accordingly now seek a similar order from the Court in its equitable jurisdiction.

The appellants then applied to strike out the claims for general damages and the claim for a mandatory injunction. The Master refused the application in respect of the general damages claims, but struck out the prayer for the mandatory injunction. She took the view that this was a form of remedy which the Broadcasting Authority could order, but was not one which the Court could impose.

Both parties applied to review the Master's decision. In an oral decision, Robertson J dismissed the defendants' application for review in respect of the Master's decision not to strike out the general damages claims. In a later reserved judgment he granted the plaintiffs' application to review the Master's decision, and reinstated the prayer for a mandatory injunction. The defendant sought leave to appeal from that decision, and Robertson J on 14 August 1992 granted leave on the ground that there was an important question raised.

The appellants accepted that in order to succeed they had to show that the claim for a mandatory injunction or order for corrective material to be published "was so clearly untenable that the plaintiff cannot possibly succeed": *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd, Mortensen v Laing* [1992] 2 NZLR 282, 305 and 311. They relied on the fact that no case could be found where such an order had been made. No textbook suggested that the power to make such an order existed. There was acknowledged power to issue an interlocutory injunction to restrain further publication of defamatory matter pending the substantive hearing, but even this power was not exercised where the defendant pleaded justification. They also referred to the Defamation Act 1992, which is not applicable to the present proceedings, but which shows that Parliament was content to confer on the Court the more limited power of recommending publication of a correction, and appeared to assume that the Court did not have power to directly order that a correction be published.

The first question is whether the Court has the jurisdiction to make such an order as the respondents seek. If it has, then there is a second question whether the circumstances of the present case are such that it is clearly untenable to suggest that such an order would be made.

I do not think it can be doubted that the Court has the necessary jurisdiction, however rarely it might be appropriate to exercise it. In Spry's Equitable Remedies 4 ed 318, the general principle is stated as follows:

"The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when this course accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

In *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 573, Lord Scarman in a judgment with which the other members of the Court agreed said in respect of interlocutory injunctions:

"But the width and flexibility of equity are not to be undermined by categorisation. Caution in the exercise of the jurisdiction is certainly needed; but the way in which the judges have expressed themselves from 1821 onwards amply supports the view for which the defendants contend that the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice."

That passage was cited and reaffirmed by Lord Scarman in *British Airways Board v Laker Airways Ltd* [1985] 1 AC 58 at 81.

In *South Carolina v Assurantie Maatschappij 'de Zeven Provinciën' NV* [1987] AC 24 Lord Brandon of Oakbrook said that the power of the High Court to grant injunctions is, subject to two exceptions, limited to two situations:

"Situation (1) is when one party to an action can show that the other party has either invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court. Situation (2) is where one

party to an action has behaved, or threatens to behave, in a manner which is unconscionable."

The other members of the Court agreed with Lord Brandon, but Lord Goff of Chieveley expressed one reservation with which Lord Mackay of Clashfern expressly agreed:

"I am reluctant to accept the proposition that the power of the court to grant injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstance in which it may be thought right to make the remedy available."

We are not dealing in this case with an application for interlocutory relief, but with the relief to be granted once the plaintiffs are found to have proved their case. This would bring the present case within Lord Brandon's situation (1). If the plaintiffs prove malice, as they must do in order to succeed on the cause of action for malicious prosecution, then situation (2) would also apply. There would thus be jurisdiction for the remedy sought even on the basis of Lord Brandon's statement. On the wider views adopted by Lord Scarman, Lord Goff and Lord Mackay, the question is not one of jurisdiction, but of discretion.

While the power may be there, it appears to have been rarely invoked and no case was cited in which an order has been made. The real issue is whether the circumstances of this case, as alleged in the statement of claim, provide an arguable basis for the making of such an order, or whether the claim to it is clearly untenable.

Only three decisions were cited to us where the issue has arisen. The first was *Burnett v The Queen and Right of Canada* (1974) DLR 3d 281, in the Ontario High Court. The plaintiff sought an order requiring the broadcast of a retraction by the defendant broadcaster. This prayer was struck out by O'Driscoll J on the ground that no case had been found where any such order had been made. The

decision does not say that there is no jurisdiction to make such an order, but it is cited for this proposition in *Gatley* para. 1086. The statement in *Gatley* was followed by Master Williams QC in *Mana Motuhake O Aotearoa (Inc) v News Media Ownership Ltd* (Wellington CP 867-88, judgment 8 October 1992). The third decision, and the only one where there is any real discussion of the issue, is the judgment of Robertson J in the present case. He referred to the decisions of the House of Lords cited in the present judgment, and to other references, and after careful consideration rejected the submission that there is no jurisdiction.

Mr Miles referred us to statements in various textbooks on defamation to the effect that the only remedy, apart from an injunction against repetition, is damages. The same view is expressed in *Goldsmith v Sperrings Ltd* [1977] 2 All ER 576 by Lord Denning MR at 578, and Scarman LJ at 582. The Report of the Faulks Committee (1975, Cmnd 5909) considered the suggestion that the Court should have power to order defendants to insert appropriate advertisements in a suitable newspaper or newspapers, but rejected it on the ground that it would impose a cost on the defendant in addition to full compensatory damages, and if that cost were to be set off against the damages, then it should be for the plaintiff and not the Court to determine how to spend his damages. In New Zealand, the ⁼Report of the Committee on Defamation (1977) rejected a similar suggestion. Both Committees proceeded on the assumption that such orders were not available under the existing law. So also did the Australian Law Commission, who referred to correction orders in Discussion Paper No.1 (1976) and in its Report No.11 (1979). It recommended that a new discretionary power should be given to the Court to order the defendant to correct the false statement defamatory of the plaintiff. In answer to the submission that a newspaper should not be required to correct a statement which it still believed to be true, the Commission said it was confident that no Judge would make an order in terms which required a defendant to express a personal view contrary to his conviction. The Court would be likely to frame an order in terms of

the determination of the Court, relying on the belief that most persons would accept the Court's view as correct whether or not the defendant subjectively acknowledged his error.

Although the Committee on Defamation had rejected the suggestion that the Court be given power to order the publication of a correction, provision to this effect was included in the bill eventually introduced into Parliament in 1988. It survived in modified form when the bill was reported back to the House in 1989, but was dropped before the bill was eventually passed. In its place, section 26 of the Defamation Act 1992 confers an express power on the Court in defamation proceedings to recommend that the defendant publish a correction. It is a power to recommend, not a power to order. The defendant can ignore the recommendation, but if he is found liable, his failure to accept the recommendation may be taken into account in assessing damages.

There is thus no doubt as to the novelty of the remedy sought in the present case. While the granting of an injunction in the terms sought is within the jurisdiction of the Court, the general view has been that the Court would not make such an order, and plaintiffs have been content to ask only for damages and sometimes for an injunction. No Court has ever made an order for correction. If an exception to past practice is to be made in the present case, then a basis must be shown in the circumstances of the present case for making such an exception.

The argument before us was focussed primarily on defamation proceedings, but in fact the primary claim brought by the respondent plaintiffs is for the related but distinct tort of malicious falsehood. Section 26 of the Defamation Act 1992 is limited to proceedings for defamation. No case was cited where an order for correction has been made in proceedings for malicious falsehood, and much the same considerations would seem to apply.

There cannot be said to be any public policy consideration which would preclude the ordering of the publication of a correction. There is statutory power for the Court to order the publication of corrective statements where there has been a breach of any of the provisions of Parts I to IV of the Fair Trading Act 1986. Section 42 of that Act empowers the Court to make such an order on the application of the Commission. A similar power, as already mentioned, has been conferred on the Broadcasting Authority by section 13 of the Broadcasting Act 1989. Nor should there be any major practical difficulty in settling the form of the proposed correction, even in the case of a television broadcast. The Court is not called upon to take on the role of a television producer, despite the plaintiffs' request that the correction be in similar form to the original programme. If the remedy were to be granted, it would be open to the Judge to ask the plaintiff to submit its proposals, and to rule on specific criticisms or objections raised by the defendant. The defendant could submit its own proposals. Both parties would have every reason to be cooperative.

Another factor relied upon in argument was that the inclusion of the prayer for a correction takes the proceedings outside section 19A of the Judicature Act 1908 and prevents the defendant from requiring trial to be before a jury. The appellant defendants indicated that they wished to have the proceedings tried by a jury. The same result would follow, however, if the proceedings had included a prayer for a declaration or for an injunction. The Court still has the power under section 19B to order trial before a Judge with a jury if it considers it appropriate to do so. There would be practical problems in the present case in that the Judge could not order the publication of a correction until the jury had found liability, but the jury in assessing damages would not know whether or not an order for correction would be made. While I understand the appellants' concern, I do not regard this as a reason for depriving the respondents of their right to claim the relief

they consider most appropriate. The mode of trial must necessarily take account of the nature of the relief sought.

I come back, therefore, to the question whether the circumstances of this case, as alleged in the statement of claim, provide an arguable basis for the making of the unusual order sought, or whether the claim to such an order is clearly untenable.

The claim is based on a television programme which appears to have been high in emotive content, and which contains the statements claimed to be defamatory of the respondents' products. One can readily appreciate the damage which such statements may have caused to the respondents' businesses. If they succeed in their action, they will, in the ordinary way, be entitled to full compensatory damages. One would expect the decision in such a case as the present to receive widespread publicity. Because the respondents are both companies, their claim in defamation is also limited to compensation for pecuniary loss. The ordinary way in which such loss is compensated is by an award of damages. The respondents are concerned to prevent, as far as they can, the continuance of ongoing losses, and it is from this point of view that they see advantage in having a correction broadcast by the appellants. They will be entitled, of course, to make such proper use of the verdict as they may wish, whether by advertising or similar promotional material. It is difficult to see that the ordering of a correction by the broadcaster some three years after the original broadcasting would materially affect the position.

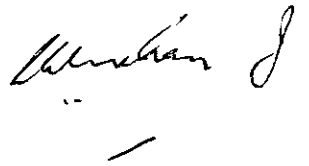
On the material which is before the Court, the present case does not appear to be materially different from any other case of malicious falsehood or defamation based on a television broadcast alleged to have falsely denigrated a particular product. There is nothing to suggest that anything might emerge in evidence at the

trial which would so distinguish the present case as to enable it to be treated as exceptional. I am satisfied that the respondents do not have an arguable case for obtaining the exceptional remedy which they seek.

The proper course is for this part of the prayer to be struck out.

The argument before Robertson J focussed on the question of jurisdiction, and I agree with him that the Court does have jurisdiction to make such an order. The argument before us has gone further, however, to consider whether the respondents have an arguable case for the exercise of the power to make such an order. In my view they have not.

I would accordingly allow the appeal.



Solicitors

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